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The Persistence of National Peculiarities: Translating Representative Environmental Action from Transnational into German Law

ANNA KATHARINA MANGOLD*

ABSTRACT

This paper explores representative environmental action in international, European Union, and German environmental law as an example of "legal translation." The Aarhus Convention, dating from 1998, requests signatory parties to provide environmental NGOs with wide access to justice so that the protection of the environment can be controlled by the judiciary. Both the European Union and Germany have implemented the provisions of the Aarhus Convention into their respective legal orders. This process of implementation can be considered as "legal translations." The argument of this paper is that a perspective of "legal translation" provides new vistas on the various intertwined layers of law constituting transnational environmental law. First, the example of representative environmental action shows how important context is for legal translations: the traditional German "impairment of rights doctrine" (Schutznormtheorie), historically developed in the nineteenth century, has still major importance in German administrative law and has to be taken into account when translating the Aarhus Convention. Secondly, legal translations take place in judicial hierarchies: both the Court of Justice of the European Union and the Compliance Committee of the Aarhus Convention have ruled upon Germany's translation of representative environmental action and found

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it wanting; yet, the picture is much more complex and nuanced than the usage of "hierarchy" suggests, as a closer look reveals. Thirdly, literal translations are the basis of legal translations: in transnational law, multiple languages have to be literally translated, both on a European and an international level. Fourthly, the example of representative environmental action demonstrates the persistence of national peculiarities: after all, national peculiarities cannot too easily be overcome or abandoned; rather, they continue to play a significant role in transnational law.

INTRODUCTION

Who is to speak for the environment? Since the 1990s, international law has pursued the goal of empowering nongovernmental organizations (NGOs) to raise awareness of environmental concerns by providing them with access to justice. International law, namely the Rio Declaration of 1992 and the Aarhus Convention of 1998, demands signatory parties enable environmental NGOs to participate in administrative procedures and request judicial review of resulting administrative decisions. The legal mechanism used to empower NGOs is representative environmental action.¹ Signatory parties to these international treaties have to implement representative environmental action into domestic law. In addition to international law, the European Union also tries to strengthen representative environmental action. As one of the driving forces behind the Aarhus Convention, the European Union obliges its Member States to implement representative environmental action into their domestic law. Both international and European law necessitate highly complex processes of implementation into domestic law. As a result, a body of interconnected environmental law of international, supranational, and national origin develops; the emerging body of law can be called transnational.²

1. "Representative environmental action" is a literal translation of the German term "*Umweltverbandsklage*." Another possible translation of "*Umweltverbandsklage*" is "public interest standing for environmental NGOs." For the sake of brevity, the literal translation, representative environmental action, will be used throughout the article.

2. See Veerle Heyvaert & Thijs Etty, *Introducing Transnational Environmental Law*, 1 TRANSNATIONAL ENVIRONMENTAL LAW 1, 3 (2012), available at http://journals.cambridge.org/abstract_S2047102512000027. For a theoretical concept of transnational law, see generally Peer Zumbansen, *Transnational Law, Evolving*, ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 898–925 (Jan Smits ed., 2d Ed. 2012) (reviewing the evolution of transnational law and its relevance in legal fields); Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 53

This article traces the implementation of representative environmental action for NGOs into domestic law using Germany as an example. Many actors, institutions, levels of legal regulation, and courts have to be considered. Environmental NGOs enter the stage as new protagonists, which have traditionally been neglected in international law.

The perspective of translation is used to describe and unfold the complex interrelated and interdependent processes of legislation at different levels, both national and international. Translation proves to be an immensely helpful analytical tool to unfold a highly complex interaction between legal regimes. While the expression “regulatory translations” could indicate translations between regulatory regimes, such as economic, environmental, societal, legal, or human rights regimes, this article uses “regulatory translations” to refer to translations between legal regulations of different origin. The translations considered in this article remain purely within the legal realm; they are translations between laws of different origin, hierarchical standing, and mechanisms of enforcement. Translating access to justice for environmental NGOs from transnational legal regimes into German law shows the multipolar, complex, and interwoven processes involved in translations between legal spheres.

Looking at the implementation of representative environmental action into German law through the lens of translation, the complexities of transnational law and, more generally, the contradictions within the law appear more clearly. Processes of translation between international law, supranational European Union (EU) law, and national law do not always follow a strictly hierarchical path, nor do they adhere to traditional conceptions of international law versus national law. In analyzing legal translations, the notion of “the law” as a supposedly stable entity can be unpacked, revealing a much more nuanced and complicated picture.

The main argument of this article is that the national level remains of decisive importance even in times of transnational law: *national peculiarities persist*. Transnational trajectories are destined to collide with national peculiarities if the latter are not sufficiently taken into account. Therefore, legal translations need to be contextual translations, national peculiarities being the context in which legal translations occur. One such national peculiarity is the German “individual public right.” Stemming from the nineteenth century, it continues to shape administrative judicial review in Germany, resulting in a highly

(Günther Handl, Joachim Zekoll, & Peter Zumbansen eds., 2012) (discussing the emergence of transnational law and the future of law and globalization).

individualized system of judicial review. This article shows how insufficiently contextualized legal translation resulted in a predictable collision of transnational and German law. Observation of this collision helps identify characteristic features of legal translations.

Just as literary translations take place in specific contexts, so too do translations between legal spheres. Thus, in the first part of the article, the specific context of translating representative environmental action is unfolded, namely the peculiar German “individual public right” dating back to the nineteenth century. In a highly individualized system of judicial review such as Germany’s, representative environmental action seems foreign, not belonging into the “original” system.

Literary translations have a text that is translated and so do translations of legal regulations. The second part of the article explores text(s) regulating representative environmental action that are translated into German law: the Aarhus Convention of 1998 and subsequent EU law implementing it. Interestingly, Germany was a party to the treaty negotiations that eventually led to the Aarhus Convention and is an influential Member State of the European Union.

The third part of the article traces attempts to translate representative environmental action from the Aarhus Convention and EU law into German law. The first attempt failed spectacularly in May 2011 when the Court of Justice of the European Union (CJEU) decided that the German implementation was inadequate.³ In April 2013, the second attempt at translation was promulgated.⁴ However, the Aarhus Compliance Committee in a recent draft finding from November 2013 still finds the new promulgation wanting.⁵

The conclusion of this article highlights some characteristics of translations of legal texts. Literary translations and legal translations share certain features, such as necessities to translate from one language to another. Translations of legal regulations, however, also display characteristics inherent to legal mechanisms such as hierarchy and control. This article advances a nuanced view of the sophisticated circumstances under which legal translations occur.

3. Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, 2011 E.C.R. I-3676.

4. See Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG [Law on Supplementary Rules to Appeals in Environmental Matters According to the EC Directive 2003/35/EG], Umwelt-Rechtsbehelfsgesetz [UmwRG] [Environmental Appeals Act], Apr. 8, 2013, BGBl. I at 753 (Ger.).

5. *ClientEarth v. Germany*, UNECE Case No. ACCC/C/2008/31 (filed Dec. 1, 2008) [hereinafter *ClientEarth Complaint*] (Draft Findings filed Nov. 11, 2013), available at <http://www.unece.org/env/pp/compliance/Compliancecommittee/31TableGermany.html>.

I. TRANSLATING IN CONTEXT: THE PECULIAR GERMAN "INDIVIDUAL PUBLIC RIGHT"

Words always carry connotations. The use of certain words triggers cascades of images, connections, and associations. Connotations essentially mean context. When translating words, the most difficult problem is to capture the context of a word. This is not only true for literary translations but also for translations of legal words, terms, and expressions.

This article is about—*inter alia*—German legal regulation of representative environmental action and, yet, it is written in English. Since legal concepts are highly dependent on their context, it is not sufficient to provide literal translations from German into English. Instead, it is necessary to explain the core concept of German administrative judicial review in its context: the "*subjektives öffentliches Recht*" (preliminary literal translation: "individual public right"). The "individual public right" provides a key to unlock the door behind which legal exchanges and battles over translations of representative environmental action into German law take place. To offer sufficient context for understanding this key concept, (A) a narrative of the politico-historical development of "individual public right" is told, (B) before the current German legislation on administrative judicial review can be presented, (C) as well as the regulation of representative environmental action prior to the Aarhus Convention, and (D) to summarize, it becomes discernible how the German administration and its control by administrative judiciary traditionally function.

A. The Historical Development of "*Subjektives öffentliches Recht*"

The expression "*subjektives öffentliches Recht*" is utterly foreign to Anglo-American law, which is why there is no exact English translation of the term. One can, however, find quite a few propositions for a translation: "subjective right vis-à-vis the public authorities," "personal

right,” “individual right,”⁶ or “subjective-public law.”⁷ To clarify its meaning, one has to consider German legal history.⁸

“Individual public right” was conceptualized as a corresponding term for the traditional “private right.” A “private right” regulates relations between private individuals or entities, or even more broadly, participants in legal transactions in the private realm (e.g., the market).⁹ By contrast, an “individual public right” is directed against the state and gives individuals (or private entities) a legal right vis-à-vis the state. The concept was developed in the liberal constitutional monarchy of the late nineteenth century at a time when the judiciary provided shelter for citizens’ rights against the monarchic executive.¹⁰

Generally, one can conceive of two ways to theorize judicial review, and leading jurists of the nineteenth century have supported both. According to the Prussian scholar of administrative law, Rudolf von Gneist,¹¹ the law creates an objective order; the role of the administrative judiciary is not only to protect individuals but also to

6. Examples taken from various EU documents. See, e.g., 2005 O.J. (C 281) 6–7 (“subjective right vis-a-vis the public authorities”); KLAUS-DIETER BORCHARDT, *THE ABC OF EUROPEAN UNION LAW* 93 (2010) (“personal right”), available at http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf; Case C-540/03, *Parliament v. Council*, 2006 E.C.R. I-5809, ¶ 59 (“individual right”).

7. MICHAEL STOLLEIS, *A HISTORY OF PUBLIC LAW IN GERMANY 1914–1945*, at 344 (Thomas Dunlap trans., 2004).

8. For a profound historical overview, see generally HARTMUT BAUER, *GESCHICHTLICHE GRUNDLAGEN DER LEHRE VOM SUBJEKTIVEN ÖFFENTLICHEN RECHT* [HISTORICAL BASES OF THE DOCTRINE OF THE SUBJECTIVE PUBLIC RIGHT] (1986) (Ger.); WILHELM HENKE, *DAS SUBJEKTIVE ÖFFENTLICHE RECHT* [THE SUBJECTIVE PUBLIC RIGHT] (1968) (Ger.).

9. See GEORG JELLINEK, *SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE* [SYSTEM OF THE SUBJECTIVE PUBLIC RIGHTS] 54–67 (2d ed. 1905) (Ger.) (describing “*Öffentliches und privates subjektives Recht*”—public and private individual right).

10. See MARTIN ROTT, *DAS VERWALTUNGSRECHTLICHE SUBJEKTIVE ÖFFENTLICHE RECHT IM SPIEGEL SEINER ENTWICKLUNG IM DEUTSCHEN LIBERALEN RECHTSSTAAT UND IN DER FRANZÖSISCHEN THÉORIE DES DROITS SUBJECTIFS DES ADMINISTRÉS* [THE ADMINISTRATIVE SUBJECTIVE PUBLIC RIGHT IN THE MIRROR OF ITS DEVELOPMENT IN THE GERMAN LIBERAL CONSTITUTIONAL STATE AND IN THE FRENCH “THEORY OF THE SUBJECTIVE RIGHTS OF THE ADMINISTRATION”] 88–137 (1976) (Ger.).

11. See generally ERICH J. HAHN, *RUDOLF VON GNEIST 1816–1895: EIN POLITISCHER JURIST IN DER BISMARCKZEIT* [A POLITICAL LAWYER IN THE BISMARCK TIME] (1995) (Ger.) (providing insights into the life of von Gneist); Christoph Schönberger, *Rudolf von Gneist (1816–1895): Die altenglische Verwaltung als Vorbild für den preußischen Rechtsstaat* [The Old-English Administration as a Model for the Prussian Constitutional State], in *FESTSCHRIFT 200 JAHRE JURISTISCHE FAKULTÄT DER HUMBOLDT-UNIVERSITÄT ZU BERLIN: GESCHICHTE, GEGENWART UND ZUKUNFT* [ANNIVERSARY PUBLICATION 200 YEARS LEGAL FACULTY OF THE HUMBOLDT UNIVERSITY TO BERLIN: PAST, PRESENT AND FUTURE] 241 (Stefan Grundmann et al. eds., 2010) (Ger.) (detailing the influence of English administration on von Gneist).

objectively control the administration.¹² Such objective control leads to the protection of individual citizens; hence, legal action of individual citizens is only taken as a starting point. According to von Gneist, a claimant needs to show a specific interest in bringing the action (*Klagebefugnis—locus standi*), so that the formal positions of claimant and respondent can be performed; the claimant does not need, however, to show an “individual public right.”¹³ The second competing approach, as represented by Otto von Sarwey and Otto Bähr, held that the protection of individual rights was the nodal point.¹⁴ Individual rights, as developed in general legal theory, existed both in private and in public law and were “generically not different.”¹⁵ The protection of individual rights would eventually lead to the correction of wrong administrative decisions. In the end, the second approach prevailed and “individual public rights” became the crux of administrative judicial review in Germany.

The dispute was historically relevant, especially for the introduction of a special administrative judiciary. It is important to keep in mind that, until the middle of the nineteenth century, the courts had not controlled the administration in Germany. The administration only granted recourse (“*Rekurs*”) to the next higher level of administration: control stayed within the administration until the administrative judiciary was introduced (first in 1863 in the Grand-Duchy of Baden).¹⁶

12. See RUDOLF VON GNEIST, *DER RECHTSSTAAT UND DIE VERWALTUNGSGERICHTE IN DEUTSCHLAND* [THE STATE OF RULE OF LAW AND THE ADMINISTRATIVE COURTS IN GERMANY] 270 (2d ed. 1879) (Ger.). See also DIETER LORENZ, *VERWALTUNGSPROZESSRECHT* [ADMINISTRATIVE PROCEDURAL LAW] 9 (2000) (Ger.) (presenting the common historical account of the divergence of theories of judicial review).

13. See GNEIST, *supra* note 12, at 271.

14. See generally OTTO VON SARWEY, *DAS ÖFFENTLICHE RECHT UND DIE VERWALTUNGSRECHTSPFLEGE* [THE PUBLIC RIGHT AND THE ADMINISTRATIVE JURISDICTION] (1880) (Ger.). See also OTTO BÄHR, *DER RECHTSSTAAT: EINE PUBLICISTISCHE SKIZZE* [THE STATE OF RULE OF LAW: A PUBLIC SKETCH] (1864) (Ger.); CARL FRIEDRICH WILHELM VON GERBER, *UEBER OEFFENTLICHE RECHTE* [ABOUT PUBLIC RIGHTS] (1852) (Ger.) (initiating the debate between theories of judicial review).

15. See BÄHR, *supra* note 14, at 46 (“*generisch nicht verschieden*”).

16. The question was whether the administration should control itself in an inner-administrative procedure with participation of citizens, see Gneist, *supra* note 12, or whether the general judiciary should control the administration, see Sarwey, *supra* note 14 and Bähr, *supra* note 14. As the first state, Baden introduced an administrative judiciary in 1863. For a historical perspective, see WOLFGANG KOHL, *DAS REICHsverwaltungsgericht: EIN BEITRAG ZUR ENTWICKLUNG DER VERWALTUNGSGERICHTSBARKEIT IN DEUTSCHLAND* [THE REICH ADMINISTRATIVE COURT: A CONTRIBUTION TO THE DEVELOPMENT OF ADMINISTRATIVE JUSTICE IN GERMANY] 9–104 (1991) (Ger.) (describing the development of the administrative judiciary in Germany before 1933); GERNOT SYDOW, *DIE VERWALTUNGSGERICHTSBARKEIT DES AUSGEHENDEN 19. JAHRHUNDERTS: EINE QUELLENSTUDIE ZU BADEN WÜRTTEMBERG UND BAYERN* [THE ADMINISTRATIVE JURISDICTION OF THE LATE 19TH CENTURY: A SOURCE BASED

It is, therefore, out of the question to simplistically judge the described development as either “good” or “bad” as a historicist understanding of historical developments possibly could be tempted to do. Rather, it is the specific and peculiar German development toward judicial control of administration, grounded in “individual public rights.”

B. Current German Regulation of the “Individual Public Right”

After the experience of the Third Reich and national socialism, during which judicial protection against acts of public authorities was withheld,¹⁷ it was considered of major importance to guarantee a general right of access to justice against acts of public authority in the newly founded Federal Republic of Germany. Consequently, such a right was incorporated in the German Constitution, the *Grundgesetz* (Basic Law, abbreviated as GG), namely in its Article 19(4), which states: “Should *any person’s rights be impaired* by public authority, he may appeal to the courts”¹⁸

The constitutional provision is enunciated in Section 42 of the *Verwaltungsgerichtsordnung* (Code of Administrative Court Procedure, abbreviated as VwGO)¹⁹ and particularly in subparagraph 2:

- (1) An action can seek to have an administrative measure set aside (action for annulment) or to have the

STUDY OF BADEN-WÜRTTEMBERG AND BAVARIA] (2000) (Ger.) (providing a historical perspective of Baden as the first state to introduce administrative judiciary in 1863); CARL H. ULE, RUDOLF VON GNEIST’S BEDEUTUNG FÜR DIE EINFÜHRUNG DER VERWALTUNGSGERICHTSBARKEIT IN PREUßEN [GNEIST’S SIGNIFICANCE FOR THE INTRODUCTION OF THE ADMINISTRATIVE JURISDICTION IN PRUSSIA] (1998) (Ger.) (detailing von Gneist’s influence on the introduction of administrative justice in Prussia).

17. For a justification of “*justizfreie Hoheitsakte*” (state acts against which no judicial remedy was available) in the times of the Nazi regime, compare HANS PETER IPSEN, POLITIK UND JUSTIZ: DAS PROBLEM DER JUSTIZLOSEN HOHEITSAKTE [POLITICS AND JUSTICE: THE PROBLEM OF POLITICAL ACTS WITHOUT JUDICIAL CONTROL] (1937) (Ger.) (arguing that it is possible to evade the problems of the Dual State by shifting the problems from substantive law to jurisdictional implementation), with ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP 147–49 (E. A. Shils et al. trans., 1969) (stating that Ipsen’s views formalistically evade the discrimination brought about by “*justizfreie Hoheitsakte*”).

18. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, Art. 19 § 4 (Ger.) (emphasis added).

19. VERWALTUNGSGERICHTSORDNUNG [VwGO] [CODE OF ADMINISTRATIVE COURT PROCEDURE], Jan. 21, 1960, BUNDESGESETZBLATT, Teil I [BGBl. I] at 17 § 42, in the official new publication as from March 19, 1991, BGBl. I at 686, last amended by Gesetz [G], Jul. 23, 2013, BGBl. I at 2543, art. 4 (Ger.).

adoption of an administrative measure ordered in the event of a refusal or failure to act (action for enjoinder).

(2) Except where otherwise provided by law, such an action is admissible only if the claimant asserts that his *rights have been impaired* by the administrative measure or by the refusal or failure to act.²⁰

Section 42(2) of the VwGO needs to be fulfilled for a court to render an action admissible. Thus, a claimant needs to show that an "individual public right" possibly has been impaired to be allowed to raise concerns. This question of admissibility is reflected in the regulation of an action's merits. The first sentence of Section 113(1) of the VwGO provides "in so far as the administrative measure is unlawful and *the claimant's rights have thereby been impaired*, the court shall set aside the administrative measure together with any internal appeal decision where appropriate."²¹ According to German public law, then, only someone whose rights might have been impaired by public authority is allowed to bring an action (Section 42 VwGO), and this person will only succeed if the court finds that the claimant's rights have indeed been impaired (Section 113 VwGO). The regulation has two consequences: (1) It is not possible to bring action without relying on the possible impairment of an individual right; and (2) the claimant will not win her case if the act of public authority was simply unlawful (e.g., because it infringed procedural rules that do not protect the claimant); instead, the act needs to have impaired the claimant's rights.

The requirement to show potential harm for an "individual public right" led to the development of a peculiar German approach: the "*Schutznormtheorie*." To my knowledge, no translation in English exists. Literally, it translates as "protective norm theory." The classic definition by its inventor Ottmar Bühler²² reads as follows:

Individual public right is the legal position of the subject vis-à-vis the state according to which the subject can claim something from the state or is entitled to do something vis-à-vis the state on the basis of a legal

20. *Id.* (emphasis added) (§ 42 has never been changed since its introduction in 1960).

21. *Id.* at § 113 (emphasis added).

22. See generally OTTMAR BÜHLER, DIE SUBJEKTIVEN ÖFFENTLICHEN RECHTE UND IHR SCHUTZ IN DER DEUTSCHEN VERWALTUNGSRECHTSPRECHUNG [INDIVIDUAL PUBLIC RIGHTS AND THEIR PROTECTION IN GERMAN ADMINISTRATIVE ADJUDICATION] (1914) (Ger.).

transaction or a cogent legal provision that is intended to protect the subject's individual interests.²³

Taking this definition as a starting point, Rainer Wahl, in one of the leading commentaries on the VwGO, explains the “individual public right” as follows: “[Bühler's] definition of the term entails three prerequisites for an ‘individual public right’: A cogent legal provision, conferring legal power, and protecting individual interests.”²⁴ For the sake of completeness, it should be added that many “individual public rights” have been “discovered” in norms, which previously were not considered to entail individual rights that grant access to justice. Thus, at first look, the seemingly narrow conception of “individual public rights” has been broadened considerably over time, not lastly by providing third parties with legal protection (“*Drittschutz*”).²⁵ However, impairment of an individual's rights is still the starting point for administrative judicial review.

23. Ottmar Bühler, *Altes und Neues über Begriff und Bedeutung der subjektiven öffentlichen Rechte* [Old and New About the Concepts and Meaning of Subjective Public Rights], in *FORSCHUNGEN UND BERICHTE AUS DEM ÖFFENTLICHEN RECHT* [RESEARCH AND REPORTS FROM THE PUBLIC LAW] 269, 274 (Otto Bachof ed., 1955) (Ger.) (“*Subjektives öffentliches Recht ist diejenige rechtliche Stellung des Untertanen zum Staat, in der er auf Grund eines Rechtsgeschäfts oder eines zwingenden, zum Schutz seiner Individualinteressen erlassenen Rechtssatzes, auf den er sich der Verwaltung gegenüber soll berufen können, vom Staat etwas verlangen kann oder ihm gegenüber etwas tun darf.*”) (quotation translated by the author here).

24. Rainer Wahl, *Vorbemerkung* [Preface] § 42 para. 2 of *VERWALTUNGSGERICHTS-ORDNUNG: KOMMENTAR* [CODE OF ADMINISTRATIVE PROCEDURE: COMMENTARY] (Friedrich Schoch, Jens-Peter Schneider & Wolfgang Bier, ed., 2013, originally published 1996) (Ger.) (“*Diese Begriffsbestimmung enthält zugleich drei Voraussetzungen für das Vorliegen eines subjektiven öffentlichen Rechts: -zwingender Rechtssatz, -verliehene Rechtsmacht, -Schutznorm.*”) (quotation translated by the author here).

25. RAINER WAHL, *HERAUSFORDERUNGEN UND ANTWORTEN: DAS ÖFFENTLICHE RECHT DER LETZTEN FÜNF JAHRZEHNTE* [CHALLENGES AND ANSWERS: THE PUBLIC LAW OF THE LAST FIVE DECADES] 34–35 (2006) (Ger.). For classic study, see MATTHIAS SCHMIDT-PREUSS, *KOLLIDIERENDE PRIVATINTERESSEN IM VERWALTUNGSRECHT: DAS SUBJEKTIVE ÖFFENTLICHE RECHT IM MULTIPOLAREN VERWALTUNGSRECHTSVERHÄLTNIS* [CONFLICTING INTERESTS IN ADMINISTRATIVE LAW: THE INDIVIDUAL PUBLIC RIGHT IN MULTI-POLAR ADMINISTRATIVE LEGAL RELATIONSHIP] (2d ed. 2005) (Ger.) (for a discussion of *locus standi*, see 550–625). See also PETER PREU, *SUBJEKTIVRECHTLICHE GRUNDLAGEN DES ÖFFENTLICHRECHTLICHEN DRITTSCHUTZES* [INDIVIDUAL RIGHT BASES OF THE PUBLIC LAW THIRD PARTY PROTECTION] (1992); PETER PREU, *DIE HISTORISCHE GENESE DER ÖFFENTLICHRECHTLICHEN BAU- UND GEWERBENACHBARKLAGEN (CA. 1800 – 1970)* [THE HISTORICAL GENESIS OF PUBLIC LAW BUILDING AND BUSINESS NEIGHBORS' COMPLAINTS (CA. 1800-1970)] (1990) (Ger.).

C. Representative Action in German Nature-Conservation Law

How, then, does representative environmental action fit into such a highly individualized concept? Preservation of the environment has been on the agenda of political activists in Germany since at least the late 1960s. The political battle was not only about bringing the topic to public consciousness but also about effective legal protection of the environment. Thus, environmental law played an important role and subsequently started to develop as a distinct field of legal research. In Germany, as in other European countries, the field of environmental law did not exist up until the late 1960s.²⁶ Rather, environmental goods were treated separately: water law, waste law, and emissions law were regulated independently.²⁷ In 1986, Article 25 of the Single European Act transferred the competence to regulate environmental matters to the European Community (EC).²⁸ Since then, EC law has set the pace for new developments in environmental law in Germany and other Member States.²⁹ Subsequently, environmental law has been of major importance for the Europeanization of German law and has often been experienced as a “provocation” in German legal scholarship.³⁰ Sometimes, the feeling of provocation has even led to resistance against new “Europeanized” legislation. This was and still is especially true if the changes affect legal principles considered to be fundamental for German law.³¹ One such fundamental principle is the aforementioned “individual public right.” Representative environmental action for NGOs is perceived to threaten this principle.

In a highly individualized system of administrative judicial review such as the German one, representative action has always raised skepticism. Prior to the Aarhus Convention, the only (federal) regulation on representative action with a real impact was Section 61 of

26. WAHL, *supra* note 25, 55-56.

27. See MICHAEL KLOEPFER ET AL., ZUR GESCHICHTE DES DEUTSCHEN UMWELTRECHTS [THE HISTORY OF GERMAN ENVIRONMENTAL LAW] (1994) (Ger.).

28. Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) at 1, art. 25.

29. See MICHAEL KLOEPFER, UMWELTSCHUTZRECHT: MIT ENTWURF DES UGB [ENVIRONMENTAL PROTECTION LAW: WITH DRAFT OF THE UGB (GERMAN ENVIRONMENTAL CODE)] 194 (2008) (Ger.).

30. ANNA KATHARINA MANGOLD, GEMEINSCHAFTSRECHT UND DEUTSCHES RECHT: DIE EUROPÄISIERUNG DER DEUTSCHEN RECHTSORDNUNG IN HISTORISCH-EMPIRISCHER SICHT [COMMUNITY LAW AND GERMAN LAW: THE EUROPEANIZATION OF THE GERMAN LEGAL SYSTEM IN HISTORICO-EMPIRICAL PERSPECTIVE] 236 (2011) (Ger.).

31. *Id.* at 461-463 (providing examples from environmental law).

the Law on Nature Protection and Countryside Preservation (*Bundesnaturschutzgesetz*, abbreviated as BNatSchG),³² which states:

(1) *Independently of any impairment of its own rights*, a . . . recognised association may bring actions in accordance with the [VwGO] challenging

1. Exemptions from prohibitions and requirements intended to protect nature conservation areas, national parks and other protected areas . . . and

2. Planning approval decisions concerning projects which entail an encroachment on nature and the countryside, together with planning permits, where public participation is provided for . . .

(2) Actions brought in accordance with subparagraph 1 are not admissible unless the association

1. claims that the adoption of one of the administrative measures mentioned in the first sentence of subparagraph 1 contravenes provisions of the present law, provisions which have been adopted or which continue to apply on the basis or within the framework of the present law, or other provisions which must be taken into account when adopting an administrative measure and *whose objectives include concern for nature protection and countryside conservation*;

2. *is affected* as regards a matter which, under its statutes, is *within its ambit* and in respect of which it is recognised, . . .³³

32. See Gesetz über Naturschutz und Landschaftspflege [Law on Nature Protection and Countryside Conservation], Bundesnaturschutzgesetz [BNatSchG], Dec. 20, 1976, BGBl. I at 3574, as amended, § 61 (Ger.).

33. *Id.*, translated in CJEU, Oberverwaltungsgericht [OVG] [Higher Administrative Court] Mar. 5, 2009, docket number C-115/09 (emphasis added).

Even in the very text of the provision, one can detect the strain this form of representative action presents for traditional administrative judicial review when comparing paragraph 1 and paragraph 2. While paragraph 1 allows a recognized association to bring an action "*independently of any impairment of its own rights*," paragraph 2 somewhat contradictorily limits the admissibility again and narrows the right to bring an action strictly to concerns of nature protection that fall within the association's "*ambit*" (i.e., its purpose).

D. Judicial Control of the Administration in Germany

As described above,³⁴ Section 113(1) of VwGO states that a claimant will only win a case if his rights have been impaired. The infringement of procedural regulations, such as certain due process requirements, does not suffice to render the act invalid. This approach toward administrative judicial review is very much concerned with the material correctness of a solution the administration has chosen, guided by legislative acts. It is the duty of the administration, as an agent of the public, to consider "general public interests"; as official authority, it is believed to fulfill its function even where no individual rights are at stake. However, no external judicial control will take place in such cases. In the traditional view, the environment and its protection are regarded as "general public interest." Hence, it is difficult to conceptualize judicial review in environmental matters.

While "individual public rights" lead courts to apply strict scrutiny, a certain neglect of procedural rules can be observed. Procedural rules in themselves cannot be used to invalidate an act of public authority. In this modern legal quarrel, the outcome of the quarrel between von Gneist, on the one hand, and Bähr and von Sarwey, on the other hand, can still be detected: judicial control is not about objective correctness of a particular solution, but about the impairment of individual rights. Correspondingly, German public law heavily focuses on substantial determination of outcomes of administrative decisions through legislation.³⁵ Legislation is intended to limit administrative discretion, so that administrative acts do not impair individual rights.³⁶ To achieve

34. See *supra* Part I.B.

35. To a large extent, procedural mistakes can be "healed," i.e. the procedural acts can be made up for later. See, e.g., *Verwaltungsverfahrensgesetz* [VwVfG] [Code of Administrative Procedure], May 25, 1976, BGBl. I at 1253, § 43 (Ger.).

36. Whether the legislation itself impairs fundamental rights is controlled by the *Bundesverfassungsgericht* (BVerfG) (Federal Constitutional Court). Apparently, in its thoroughness, this binding legislation is also remarkable in a comparative perspective. See FRIEDERIKE VALERIE LANGE, GRUNDSRECHTSBINDUNG DES GESETZGEBERS: EINE

substantial protection of individual rights and, contrary to common law conceptions such as the Wednesbury doctrine,³⁷ German administrative courts are even allowed to consider the administration's exercise of margin of appreciation (*Ermessenskontrolle*).³⁸ The German approach of considering impairment of individual public rights, therefore, is distinctly different from a procedural approach. A procedural approach strengthens the right of individuals—and civil society in general—to participate in processes of administrative decision making. British, U.S., and EU laws are said to be much more concerned with procedural rules than with normative determinations of the outcomes of administrative decisions.³⁹

Maybe not representative, but none-the-less telling, in September 2012, the Public Law Department of the German Jurists' Conference, an annual meeting of German lawyers, both from practice and academia and very rich in tradition, rejected the idea of more public participation in decision making concerning large projects.⁴⁰ This vote could be interpreted as follows: German lawyers⁴¹ still want the administration to deliver decisions determined by substantive legislation and are clearly opposed to more public participation in administrative decision-making processes.

German administrative judicial review can be summed up by the following three concepts: (1) The judiciary repeatedly refers to the mantra that an *actio popularis* should be prevented by all means; (2) representative action has always had an exceptional status in German public law; and (3) the question of who is allowed to bring action against the administration is deeply intertwined with the conception of what administration does: it creates legally sound, correct solutions for

RECHTSVERGLEICHENDE STUDIE ZU DEUTSCHLAND, FRANKREICH UND DEN USA [THE LEGISLATOR'S COMMITMENT TO FUNDAMENTAL RIGHTS: A LEGAL-COMPARATIVE STUDY OF GERMANY, FRANCE, AND THE USA] (2010) (Ger.).

37. Also known as "Wednesbury test of unreasonableness." See *Assoc. Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 2 ALL ER 680 (Eng.).

38. See generally TANJA SCHMIDT, *DIE SUBJEKTIVIERUNG DES VERWALTUNGSRECHTS* [THE SUBJECTIVATION OF ADMINISTRATIVE LAW] (2006) (providing a detailed historical analysis of the subjectivation of administrative law).

39. See SABINE SCHLACKE, *ÜBERINDIVIDUELLER RECHTSSCHUTZ: PHÄNOMENOLOGIE UND SYSTEMATIK ÜBERINDIVIDUELLER KLAGEBEFUGNISSE IM VERWALTUNGS- UND GEMEINSCHAFTSRECHT, INSBESONDERE AM BEISPIEL DES UMWELTRECHTS* [OVERINDIVIDUAL LEGAL PROTECTION: PHENOMENOLOGY AND SYSTEMATICS OF OVERINDIVIDUAL COMPLAINT POWERS IN ADMINISTRATIVE AND COMMUNITY LAW, IN PARTICULAR BY THE EXAMPLE OF ENVIRONMENTAL LAW] 249–50 (2008) (Ger.).

40. Corinna Sicko, *Abteilung Öffentliches Recht* [Department of Public Law], 68 JURISTENZEITUNG [JZ] 403, 403–04 (2013) (Ger.).

41. That is, those present at the Meeting of the German Jurists' Conference in Munich in September 2012.

problems determined by legislative acts or it follows procedural steps, which eventually will bring about a democratically legitimized solution.

It is in this context that the implementation of representative environmental action by NGOs takes place. The historical development is essential to understanding the resistance against forms of "proceduralization" and possibly also against "democratization" of administrative decision making in Germany. Against this background, the resistance against tendencies of the Aarhus Convention and EU law to "proceduralize" and "democratize" administrative judicial review of environmental protection is not surprising.

II. TRANSLATING LEGAL REGULATIONS: THE AARHUS CONVENTION AND EU LAW

In 1992, the United Nations Conference on Environment and Development met in Rio de Janeiro and adopted the Rio Declaration of 1992, a soft-law instrument that is not binding.⁴² The Rio Declaration touched upon the question of representation of environmental concerns. Principle 10 of the Rio Declaration reads as follows:

Environmental issues are best handled with the *participation of all concerned citizens*, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective *access to judicial and administrative proceedings*, including redress and remedy, shall be provided.⁴³

42. It is, however, disputed whether at all, and if so which, principles may already be part of international customary law. Cf. ANDREAS VON ARNAULD, VÖLKERRECHT [INTERNATIONAL LAW] 349 (2012) (Ger.).

43. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter *Rio Declaration on Environment and Development*] (emphasis added).

In so called Western states, negotiations started under the auspices of the United Nations Economic Commission for Europe (UN-ECE).⁴⁴ The UN-ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as the Aarhus Convention, was signed on June 25, 1998 in Aarhus, Denmark.⁴⁵ According to Article 20 paragraph 1, the Convention entered into force on October 30, 2001, after ratification by sixteen parties, including the European Union and—with some delay—the Federal Republic of Germany.⁴⁶ In addition to the two pillars of access to information and public participation in decision making, the Aarhus Convention obliges signatory parties in its third pillar to provide environmental NGOs with access to judicial and extrajudicial procedures controlling the legality of projects relevant for the environment (A.). The Aarhus Convention, as an international treaty, obliges signatory parties to implement its regulations into domestic law. Such implementation always involves complex acts of legal translation. Since the European Union is a party to the Aarhus Convention, it has to implement the Convention into EU law, which then again binds EU Member States to implement EU law into their domestic law (B.).

44. The UN-ECE is one of five regional commissions of the United Nations and was founded in 1947 by the UN Economic and Social Committee (ECOSOC) with the aim to promote economic cooperation among its member states. Member states of the UN-ECE are the European states as well as the successor states of the Soviet Union, the USA, Canada, Turkey, Cyprus and Israel. *See generally* U.N. COMM'N FOR EUR. (Nov. 28, 2013), <http://www.unece.org/>.

45. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention] available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

46. Gesetz zu dem Übereinkommen über den Zugang zu Informationen, die Öffentlichkeitsbeteiligung an Entscheidungsverfahren und den Zugang zu Gerichten in Umweltangelegenheiten (Aarhus-Übereinkommen) [Law on the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)], Dec. 9, 2006, BGBl. II at 1251 (Ger.). For the Federal Republic of Germany, the Convention entered into force on April 15, 2007; the instrument of ratification has been deposited with the Secretary General of the United Nations on January 15, 2007. *See* Bekanntmachung über das Inkrafttreten des Übereinkommens über den Zugang zu Informationen, die Öffentlichkeitsbeteiligung an Entscheidungsverfahren und den Zugang zu Gerichten in Umweltangelegenheiten (Aarhus-Übereinkommen) [Notice of the Entry into Force of the Aarhus Convention], Aug. 8, 2007, BGBl. II at 1392 (Ger.). *See also* UNITED NATIONS TREATY COLLECTION, CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-13.en.pdf> [hereinafter Aarhus Ratification Record] (listing member state parties to the Aarhus Convention).

A. *The Aarhus Convention: "Democratization" of Environmental Protection*

The Aarhus Convention realizes Principle 10 of the *Rio Declaration* from 1992.⁴⁷ The seventh recital of the Convention states "that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually *and in association with others*, to protect and improve the environment for the benefit of present and future generations"; the eighth recital clarifies "that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have *access to justice in environmental matters*"; the thirteenth recital recognizes "the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection"; and, finally, the eighteenth recital demands "that *effective judicial mechanisms should be accessible to the public, including organizations*, so that its legitimate interests are protected and the law is enforced."⁴⁸

The "public concerned" is defined rather broadly in Article 2(5), including environmental NGOs: "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, *non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest*."⁴⁹ Reading the recitals and Article 2(5) of the Aarhus Convention, the "public" and, more specifically, environmental NGOs play a key role in the Convention's concept for protecting the environment. Article 9 regulates access to justice for the "public concerned" in more detail. Article 9(1) covers access to justice in cases where access to information has been granted by the Convention. Article 9(2) requires access to justice for a group of decisions listed in the Convention. It reads as follows:

Each Party shall, within the framework of its national legislation, ensure that *members of the public concerned*

(a) Having a *sufficient interest or, alternatively,*

47. Aarhus Convention, *supra* note 45, at 450 (citing *Rio Declaration on Environment and Development*, *supra* note 43, ¶ 10).

48. *See id.* at 450–51 (emphasis added).

49. *Id.* at 452 (emphasis added).

(b) Maintaining *impairment of a right*, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to *challenge the substantive and procedural legality* of any decision, act or omission . . .⁵⁰

Article 9(3) provides a basic obligation to provide access to justice for all other decisions relating to the environment in national law.⁵¹

1. *Environmental NGOs as Claimants*

What, then, is the legal role of environmental NGOs as claimants? Article 9(2) introduces two alternatives. Alternative (a) provides access to judicial review for “members of the public concerned” who have “a sufficient interest.” The meaning of alternative (b) is a bit murkier, and there have been controversies about its interpretation.⁵² Alternative (b) demands “maintaining impairment of a right” and needs to be read together with the half-sentence “where the administrative procedural law of a Party requires this [i.e. the impairment of a right] as a precondition.” Alternatives (a) and (b) of Article 9(2) can be implemented “*alternatively*” by the parties to the Convention. The alternatives accommodate two different approaches to administrative judicial review in countries that have ratified the Aarhus Convention: the first approach is based on “sufficient interest” (alternative (a)); the second approach demands “impairment of a right” (alternative (b)). As shown above,⁵³ Germany requires “impairment of a right” (namely, an “individual public right”) as a precondition to administrative judicial review. The Aarhus Convention places the two alternatives at the disposal of the parties—which system they choose is up to them.

Providing parties with a choice is an attempt to facilitate translating regulatory aims into domestic law. Yet, at the same time,

50. Aarhus Convention, *supra* note 45, art. 9(2) (emphasis added).

51. Article 9, § 3 provides that “In addition . . . , *members of the public* have access to administrative or judicial procedures to *challenge acts and omissions* by private persons and public authorities *which contravene* provisions of its *national law relating to the environment*.” *Id.* at 460 (Emphasis added). Article 9, § 4 of the Aarhus Convention further provides that the environmental review procedures provided in §§ 2–3 shall be “fair, equitable, timely and not prohibitively expensive.” *Id.*

52. See SCHLACKE, *supra* note 39, at 248–49.

53. See *supra* Part I.

choice sustains ambiguity. The *telos* of the Aarhus Convention, as expressed both in the recitals and in Article 9, arguably is to provide “wide access to justice” for the “public concerned” and for environmental NGOs as part of this public. Such a view highlights the “advocatoric function of representative action.”⁵⁴

The very first ruling of the Aarhus Compliance Committee regarding alternatives (a) and (b) of Article 9(2) supports this view.⁵⁵ The Compliance Committee held that “[a]lthough what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided ‘with the objective of giving the public concerned wide access to justice’ within the scope of the Convention” and states that national law cannot be used “as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act [sic] or omissions that contravene national law relating to the environment.”⁵⁶

Apparently, the negotiating parties also considered “wide access to justice” as a central demand imposed by the Aarhus Convention. From the very beginning, one of the most controversial topics was the introduction of representative environmental action, both in the treaty negotiations and in German legal scholarship.⁵⁷ In the treaty

54. See Andreas Fischer-Lescano, *Transnationales Verwaltungsrecht: Privatverwaltungsrecht, Verbandsklage und Kollisionsrecht nach der Århus-Konvention* [Transnational Administrative Law: Private Administrative Law, Collective Action, and Conflicts of Law After the Aarhus-Convention], 63 JURISTENZEITUNG [JZ] 373, 375 (2008) (Ger.).

55. The Aarhus Compliance Committee will be considered further *infra* Part III.B.1.

56. See Report of the Meeting of the Parties to the Convention on Access to Info., Pub. Participation in Decision-making and Access to Justice in Env'tl. Matters, U.N. ESCOR, June 14-16, 2006, ¶¶ 27-35, U.N. DOC. ECE/MP.PP/C.1/2006/4/Add.2 (July 28, 2006) (emphasis added).

57. For relevant treaty negotiations, see ANGELA SCHWERDTFEGGER, *DER DEUTSCHE VERWALTUNGSRECHTSSCHUTZ UNTER DEM EINFLUSS DER AARHUS-KONVENTION: ZUGLEICH EIN BEITRAG ZUR FORTENTWICKLUNG DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE UNTER BESONDERER BERÜCKSICHTIGUNG DES GEMEINSCHAFTSRECHTS* [GERMAN ADMINISTRATIVE JUDICIAL REVIEW UNDER INFLUENCE OF THE AARHUS-CONVENTION: A CONTRIBUTION TO DEVELOP INDIVIDUAL PUBLIC RIGHTS WITH PARTICULAR REGARD TO COMMUNITY LAW], 291 (2010) (Ger.). For relevant German legal scholarship, see Martin Kment, *Der ewige Patient: die Umweltverbandsklage—Einblicke in eine lange Krankenakte und neue Therapieansätze* [The Everlasting Patent: Environmental Collective Action—Insights in a Voluminous Patient Document and New Therapies], 2013 UMWELT- UND PLANUNGSRECHT 41, 41–47 (providing a summary of representative environmental action with reference to fierce controversies on the subject in footnotes 35–36) (Ger.); Christian Walter, *Internationalisierung des deutschen und Europäischen Verwaltungsverfahrens- und Verwaltungsprozessrechts – am Beispiel der Århus-Konvention* [Internationalization of German and European Administrative Proceedings and Administrative Court Procedural

negotiations, Germany worked toward a dilution of access to justice, especially of the provision in Article 9. Eventually, Germany achieved the incorporation of alternative (b) in Article 9(2).⁵⁸ Still, the Aarhus Convention was considered to demand changes too fundamental, especially for the German system of administrative judicial review. Germany did not sign the Convention until the last possible day, and only after a change of government and after a new Minister of the Environment, a member of the Green Party, took office.⁵⁹ In the end, Germany ratified the Convention on January 15, 2007 and became its fortieth party.⁶⁰

2. "Democratization" of Environmental Protection

The Aarhus Convention internationalizes administrative procedural law and *locus standi*.⁶¹ It also allows transboundary claimants to bring action.⁶² As Andreas Fischer-Lescano rightly states:

The Aarhus Convention is procedural and transnational. Modern "environmental protection through procedure" includes numerous actors, also non-state actors, within and outside of state-administrative centres of decision-making; it transcends the classic *ius inter gentes* both in a spatial and in a functional regard.⁶³

Former Secretary General of the United Nations, Kofi Annan, characterized the Aarhus Convention as follows: "Although regional in scope, the significance of the Aarhus Convention is global . . . [I]t is the

Law—By the Example of the Aarhus Convention], 2005 EUROPARECHT [EUR. L.] 302, 306 & n.24 (Ger.).

58. See SCHWERDTFEGER, *supra* note 57, at 16.

59. See Thomas Bunge, *Einleitung [Introduction]*, in *INFORMATIONENRECHTE, ÖFFENTLICHKEITSBETEILIGUNG UND RECHTSSCHUTZ IM UMWELTRECHT: AARHUS-HANDBUCH [INFORMATION RIGHTS, PUBLIC PARTICIPATION AND LEGAL PROTECTION IN ENVIRONMENTAL LAW: AARHUS-HANDBOOK]* 1, 8 (Sabine Schlacke, Christian Schrader & Thomas Bunge eds., 2010); NICOLA WIESINGER, *INNOVATION IM VERWALTUNGSRECHT DURCH INTERNATIONALISIERUNG: EINE RECHTSVERGLEICHENDE STUDIE AM BEISPIEL DER AARHUS-KONVENTION [INNOVATION IN ADMINISTRATIVE LAW THROUGH INTERNATIONALISATION: A COMPARATIVE STUDY USING THE EXAMPLE OF THE AARHUS CONVENTION]* 36 (2013) (Ger.).

60. See Aarhus Ratification Record, *supra* note 46.

61. Hans-Joachim Koch & Christin Mielke, *Globalisierung des Umweltrechts [Globalization of Environmental Law]*, 2009 ZEITSCHRIFT FÜR UMWELTRECHT [J. ENVTL. L.] [ZUR] 403, 405 (Ger.).

62. See Alan Boyle, *Human Rights and the Environment: Where Next?*, 23 EUR. J. INT'L L. 613, 635 (2012).

63. See Fischer-Lescano, *supra* note 54, at 374.

most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations."⁶⁴

The Aarhus Convention does not focus on a specific global environmental problem, such as climate change, pollution of the seas, or protection of endangered species. Rather, it aims to generally strengthen the position of the public in regards to environmental protection, namely by providing actors with rights to information, rights to participation in environmentally relevant administrative procedures, and finally with access to justice.⁶⁵ The "public concerned" is allowed and, to some extent, encouraged to participate both individually and as collective organizations. Even though the "public concerned" does not legislate upon environmental decisions, broader public participation arguably leads to more democratic legitimacy of such decisions. Hence, to enable public participation in processes of environmental decision making can rightly be labeled as "democratization" of environmental law.⁶⁶

Going one step further, Alan Boyle makes an interesting point in arguing that access to justice as outlined in the Aarhus Convention should lead to an interpretation of the Convention as a human rights treaty because "[p]ublic participation is a central element in sustainable development" and participatory rights "can be seen as a means of legitimizing decisions about sustainable development."⁶⁷ He calls the procedural rights of the Aarhus Convention "the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development."⁶⁸

3. *Translating an International Treaty*

When translating between legal spheres, the process of translation does not only entail translations in a metaphorical sense but also translations in a literal, hands-on sense. Authentic texts of the Aarhus Convention exist in English, French, and Russian as official languages of the UN-ECE. The United Nations has officially translated the text of the Convention into Arabic, Chinese, and Spanish. Unofficial

64. STEPHEN STEC & SUSAN CASEY-LEFKOWITZ, U.N. ECON. COMM'N FOR EUR., THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, at v, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3 (Jerzy Jendroska ed., 2000) [hereinafter AARHUS IMPLEMENTATION GUIDE], <http://www.unece.org/env/pp/acig.pdf> (emphasis added).

65. See Koch & Mielke, *supra* note 61, at 405.

66. See Jeremy Wates, *The Aarhus Convention: A Driving Force for Environmental Democracy*, 2 J. EUR. ENVTL. & PLAN. L. 2, 5-6 (2005).

67. See Boyle, *supra* note 62, at 622.

68. See *id.* at 616.

translations in a variety of other languages exist as well: Armenian, Bosnian, Bulgarian, Czech, Danish, Estonian, Finnish, Georgian, German, Greek, Hungarian, Italian, Japanese, Kazakh, Latvian, Lithuanian, Macedonian, Mongolian, Polish, Portuguese, Romanian, Slovak, Slovenian, Swedish, and Ukrainian.⁶⁹

This impressive list shows the importance of literal translations of legal documents in the international realm. Translations become points of dispute if their meanings differ. An assumption of this paper is that disputes over correct translations inevitably will occur precisely because translations are not only about literal transference of meaning but also about the connotations and connections every single word entails. The framework in which legal translations happen is the entire legal order, including its history and peculiarities.

B. European Union Law: "Proceduralization" of Environmental Protection

The European Union is party to the Aarhus Convention and, therefore, is under an obligation to implement its provisions into EU law. The European Union was an important initiator of the Aarhus Convention; to a considerable extent, the Convention's regulations mirror preexisting EU law,⁷⁰ and it is, therefore, not very surprising that subsequent EU legislation also mirrors the Aarhus Convention. This is especially true for access to information and participation in decision making. The regulation of the procedural and judicial law of the Member States, though, does not easily fit into the catalogue of enumerated competencies of the European Union.⁷¹ As the Aarhus Convention touches upon competencies of both the European Union and its Member States, it is a so called mixed agreement.⁷² Regarding access to justice, the competence of the European Union to regulate on the matter is hotly debated:⁷³ traditionally, Member States of the European Union are organizationally autonomous (i.e., they have to implement EU law into their domestic law), but how they achieve enforcement of EU law and how they organize the execution of EU law is up to the

69. For unofficial translations of the Aarhus Convention in other languages see U.N. Econ. Comm'n for Eur., *Full Text of the Convention*, <http://www.unece.org/env/pp/treatytext.html> (last visited Oct. 10, 2013).

70. See SCHLACKE, *supra* note 39, at 249.

71. See Consolidated Version of the Treaty on European Union, art. 5, Sept. 5, 2008, 2008 O.J. (C 115) 13, 18 [hereinafter TEU] ("The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.").

72. For further references, see SCHLACKE, *supra* note 39, at 250.

73. See *id.*

Member States. The idea of “indirect enforcement” of EU law tries to capture this supposedly clear-cut distinction; in reality, though, the distinction became blurred a long time ago.⁷⁴

1. *Translating the Aarhus Convention into European Union Law*

In the case of the Aarhus Convention, the European Union has, so far, implemented Article 9(2) in Directive 2003/35,⁷⁵ but Article 9(3) has not yet been implemented despite a proposal of the Commission since 2004.⁷⁶ Directive 2003/35 amended the Environmental Impact Assessment (EIA) Directive.⁷⁷ Recitals 3 and 4 in the preamble to Directive 2003/35 concern public participation.⁷⁸ Recital 4 refers expressly to the role of environmental NGOs, stating that “participation by *associations, organisations and groups, in particular nongovernmental organisations promoting environmental protection*, should . . . be fostered.”⁷⁹

Article 1(2) of the EIA Directive,⁸⁰ as amended by Directive 2003/35, virtually mirrors Article 2(5) of the Aarhus Convention in defining “the public concerned.”⁸¹ Directive 2003/35 also inserted a new article—

74. See MANGOLD, *supra* note 30, at 374–76.

75. Council Directive 03/35, Providing for Public Participation in Respect of the Drawing Up of Certain Plans and Programmes Relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/EEC and 96/61/EC, 2003 O.J. (L 156) 17, 17 (EC) [hereinafter Directive 2003/35] (citing Council Directive 85/337/EEC, on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40 [hereinafter Directive 85/337/EEC]; Council Directive 96/61/EC, Concerning Integrated Pollution Prevention and Control, 1996 O.J. (L 257) 26 [hereinafter Directive 96/61/EC]) (implementing art. 9, § 2 of the Aarhus Convention, *supra* note 47, at 459–60).

76. See generally *Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters*, COM (2003) 624 final (Oct. 24, 2003).

77. See Directive 2003/35, *supra* note 75, at 18–20 (amending the EIA Directive (originally Directive 85/337/EEC, *supra* note 75)).

78. See *id.* at 17, Recital 3 (“Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby *increasing the accountability and transparency of the decision-making process* and contributing to public awareness of environmental issues and support for the decisions taken.” (emphasis added)).

79. See *id.* at 17 (emphasis added).

80. For the important role of Environmental Impact Assessment in the process of Europeanisation of German public law, see Mangold, *supra* note 30, at 236–7.

81. Compare Directive 2003/35, *supra* note 75, at 19 (“the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, *non-governmental organisations promoting environmental protection and meeting any requirements under*

Article 10(a)—into the EIA Directive. Article 10(a) of the EIA Directive contains provisions dealing with access to justice and follows the Aarhus Convention in offering Member States a choice between alternative (a) “sufficient interest” and alternative (b) “impairment of a right.”⁸² Article 10(a)(3) is noteworthy because it expressly demands an interpretation with a view to granting “wide access to justice”:

(3) What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.⁸³

These provisions fit neatly into EU environmental law, which has been characterized by developments toward “proceduralization” since the mid-1980s.⁸⁴ Generally, the EU regulation implementing the Aarhus Convention stresses the importance of “wide access to justice,”⁸⁵ while, at the same time, trying to accommodate the two most important

national law shall be deemed to have an interest” (emphasis added)), with Aarhus Convention, supra note 43, art. 2(5), at 452.

82. Directive 2003/35, *supra* note 75, at 20 (amending Directive 85/337/EEC, *supra* note 75) (“[1] Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a *sufficient interest*, or alternatively, (b) *maintaining the impairment of a right*, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive. [2] Member States shall determine at what stage the decisions, acts or omissions may be challenged.” (emphasis added)).

83. *See id.* at 20. (emphasis added).

84. *See* SCHLACKE, *supra* note 39, at 413–414; Matthias Schmidt-Preuß, *Gegenwart und Zukunft des Verfahrensrechts [Present and Future of Procedural Law]*, 2005 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NEW REVIEW OF ADMINISTRATIVE LAW] [NVWZ] 489, 492 (Ger.).

85. It is, however, criticized that the EU has not legislated in a coherent body of regulations but in a fragmented way. *See generally* Charles Poncelet, *Access to Justice in Environmental Matters—Does the European Union Comply with Its Obligations?* 24 J. ENVTL. L. 287 (2012) (questioning the effectiveness of judicial remedies concerning environmental measures taken by EU authorities).

approaches to administrative judicial review among Member States of the European Union: the “sufficient interest” approach and the “impairment of a right” approach.

2. *Literal Translations in EU Law*

The European Union now has twenty-seven Member States, many of which have more than one official language. Therefore, it is not surprising that the multilingualism of the European Union has been discussed in academia.⁸⁶ The European Commission has even issued a little brochure on “Translation and Multilingualism.”⁸⁷

Different language versions often result in controversies in EU law.⁸⁸ The difficulties are even more profound in EU law than in international law. Article 55 of the Treaties of the European Union (TEU) acknowledges twenty-three official languages, each of which is legally recognized as equally authentic.⁸⁹ Because the working languages in European institutions are mainly English, French, and German, translations of legal texts occur on a daily basis.

86. See generally THOMAS BRUHA, *DIE EUROPÄISCHE UNION UND IHRE SPRACHEN: INTERDISZIPLINÄRES SYMPOSIUM ZUR VIELSPRACHIGKEIT ALS HERAUSFORDERUNG UND PROBLEMNATIK DES EUROPÄISCHEN EINIGUNGSPROZESSES: GESPRÄCH ZWISCHEN WISSENSCHAFT UND PRAXIS* [THE EUROPEAN UNION AND ITS LANGUAGES: AN INTERDISCIPLINARY SYMPOSIUM ABOUT MULTILINGUALITY AS A CHALLENGE AND PROBLEM OF THE PROCESS OF EUROPEAN INTEGRATION: DIALOGUE BETWEEN ACADEMIA AND PRACTICE] (1998) (Ger.); ISABEL SCHÜBEL-PFISTER, *SPRACHE UND GEMEINSCHAFTSRECHT* [LANGUAGE AND COMMUNITY LAW] (2004) (Ger.). See also Karin Luttermann, *Mehrsprachigkeit am Europäischen Gerichtshof: Das Referenzsprachenmodell für ein EU-Sprachenrecht* [Multilinguality at the European Court of Justice: The Reference Language Model for an EU-Language Law], in *STUDIEN ZUR RECHTSKOMMUNIKATION* [STUDIES ON LEGAL COMMUNICATION] 47 (Dorothee Heller & Konrad Ehlich eds., 2007) (Ger.), for a discussion from a linguistic perspective.

87. See generally EUR. COMM'N, *TRANSLATION AND MULTILINGUALISM* (2012).

88. This is seen most prominently in the recent debate about the interpretation of Article 51 of the EU's Charter of Fundamental Rights because the German and English version indicate a more limited scope of the Charter than other versions. See Charter of Fundamental Rights of the European Union art. 51, Dec. 18, 2000 O.J. (C 364) 1, 21.

89. See TEU, *supra* note 71, art. 55, at 45 (“This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.” (emphasis added)).

III. ATTEMPTING A TRANSLATION INTO GERMAN LAW: “INDIVIDUALIZATION” OF ENVIRONMENTAL PROTECTION

Nation-states that are both a party to the Aarhus Convention and a Member State of the European Union, such as Germany, are under a dual obligation to implement both the Aarhus Convention and the corresponding EU law into their domestic law. In this article, Germany and its implementation of access to justice for environmental NGOs serve as a multidimensional and multifaceted example of a legal translation.

Germany made a first attempt at a translation of the Aarhus Convention (and subsequent EU law) in 2006. Legal translation, though, takes place in complex fields of hierarchy and is controlled. After the CJEU in 2011 condemned Germany for too narrowly translating the Aarhus/EU conception of representative environmental action, in April 2013 a second attempt was issued—its success is yet to be determined.

A. *The First Translation of the Aarhus Convention*

After the Aarhus Convention and subsequent Directive 2003/35/EC, German legal scholars disagreed on the necessity of major changes in preexisting German law: while some pointed to indispensable changes,⁹⁰ others could not detect any such necessity to adapt.⁹¹ Such disparate assessments result from alternatives (a) and (b) from the Aarhus Convention and EU law, which were left at the disposal of parties/Member States. As is clear from what has been reported so far, implementation in Germany has to be considered in the framework of alternative (b), as German administrative judicial review requires “impairment of an individual public right.”

In 2006, the Environmental Appeals Act (*Umweltrechtsbehelfsgesetz*, abbreviated as UmwRG) implemented Directive 2003/35/EC into German law. Section 2(1) of the UmwRG, in particular, provides:

A domestic or foreign association recognised under
[specified conditions] may bring an action in accordance

90. See, e.g., Felix Ekhardt, *Die nationale Klagebefugnis nach der Aarhus-Konvention* [*The National Locus Standi After the Aarhus Convention*], 2006 NVWZ 55 (Ger.); Felix Ekardt & Katharina Pöhlmann, *Europäische Klagebefugnis: Öffentlichkeitsrichtlinie, Klagerechtsrichtlinie und ihre Folgen* [*European Standing: Directive on Public Accessibility, Directive on Standing and Their Consequences*], 2005 NVwZ 532 (Ger.).

91. See Schmidt-Preuß, *supra* note 84, at 494 (“acknowledgement of the German approach of individual protection” (quotation translated by the author here)).

with the VwGO to challenge a decision within the meaning of the first sentence of Paragraph 1(1) or a failure to adopt such a decision, *without being required to maintain an impairment of its own rights*, provided that the association

1. asserts that a decision within the meaning of the first sentence of paragraph 1(1) or a failure to adopt such a decision contravenes legislative provisions which seek to protect the environment, *which confer individual rights* and which may be relevant to the decision.⁹²

However, Section 2(5) of UmwRG states that:

Actions brought in accordance with subparagraph 1 shall be deemed well founded,

1. in so far as the decision within the meaning of the first sentence of Paragraph 1(1) or the failure to adopt such a decision infringes legislative provisions which seek to protect the environment, *which confer individual rights* and which are relevant to the decision and the infringement affects environmental protection concerns included in the objectives which the association, under its statutes, is committed to promote.⁹³

Certainly, a “trans-individual dimension” of representative environmental action can be discerned in these provisions, and environmental protection associations may be considered “advocates for the environment,” as Andreas Fischer-Lescano formulated in his argumentative statement in favor of a broad reading of these

92. Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG [Law on Supplementary Rules to Appeals in Environmental Matters According to the EC Directive 2003/35/EG], Umwelt-Rechtsbehelfsgesetz [UmwRG] [Environmental Appeals Act], Dec. 7, 2006, BGBl. I at 2816, § 2(1) (Ger.). “The present law shall apply to actions which challenge . . . decisions within the meaning of section 2 paragraph 3 of the Gesetz über die Umweltverträglichkeitsprüfung (UVP) (Law on environmental impact assessments) concerning the admissibility of projects in relation to which under . . . the UVP . . . there may be an obligation to implement an environmental impact assessment.” *Id.* at 2816, § 1(1) (quotation translated by the author here).

93. *Id.* at § 2(5).

provisions.⁹⁴ In the end, however, the German translation of the Aarhus Convention and EU regulations remains very ambiguous. On the one hand, environmental associations are not required to “maintain an impairment of their own right,” while, on the other hand, such actions will only be successful if provisions that protect individual rights are infringed.⁹⁵

As shown above, both the Aarhus Convention and subsequent EU law demand “wide access to justice.”⁹⁶ Notably, at the time the UmwRG was issued, its conformity with both regulations had been highly questionable.⁹⁷ However, it is a specific feature of legal translations that they are controlled—mostly within judicial hierarchies; in the end, courts decide whether or not a legal translation is appropriate.

B. Translating in Hierarchies: Duties to Translate and Control Issues

With international and supranational (European) law, different levels of legislation are involved in regulating representative environmental action.⁹⁸ Every level has its own bodies to control effective implementation of its legislation. Translations, then, do not occur free from any form of “hierarchy”: compliance mechanisms and judicial review of enforcement measures have to be considered when describing legal translations. Germany is under dual control; both the Aarhus Compliance Committee and the CJEU monitor Germany’s translation of representative environmental action into German law.

94. See Fischer-Lescano, *supra* note 54, at 378 (mentioning “*transsubjektiv*” (trans-individual) and signifying a dimension beyond the traditional public individual right approach).

95. See Sabine Schlacke, *Die Novelle des Umwelt-Rechtsbehelfsgesetzes: EuGH ante portas? [Amendment to the Environmental Appeals Act: CJEU ante portas?]*, 2013 ZEITSCHRIFT FÜR UMWELTRECHT [ZUR] 195 (Ger.) (explaining that an association is only allowed to contest infringements of objectives that are listed in the statute and that until the middle of 2012, forty-two lawsuits based on § 2 of the UmwRG had been decided by German courts, with fourteen proceedings pending before courts at the time).

96. See discussion *supra* Parts II.A.1 (Aarhus Convention), II.B.1 (EU Law).

97. See Felix Ekardt, *Das Umweltrechtsbehelfsgesetz vor dem EuGH und dem BVerwG [The Environmental Appeals Act Before the Court of Justice and the Federal Administrative Court]*, 2012 NVWZ 530, 530 n.2 (Ger.).

98. The term “level,” as in multi-level governance, in part is misleading as it suggests a clear and distinct separation of these levels where in fact the boundaries are sometimes clear and sometimes blurred, and not always simply horizontal. Sabino Cassese introduced the term “marble cake” as a better description at a conference in Heidelberg in 2008. “Marble cake” is both more to the point and funnier. Regrettably, it could not win much ground compared to “levels.” Thus, the term “level” will be used with the caveat in mind.

These mechanisms, however, are not strictly hierarchical but rather should be seen in their respective and very complex contexts.

1. Aarhus and Its Control: The Compliance Commission

In Article 15, the Aarhus Convention foresees a compliance mechanism to be established by the Meeting of the Parties.⁹⁹ In its *decision I/7 on review of compliance*, the Meeting of the Parties regulated the structure and functions of a Compliance Committee and, surprisingly for an international law body, decided that “communications may be brought before the Committee by one or more members of the public concerning that Party’s compliance with the Convention.”¹⁰⁰ Hence, the Committee hears complaints from the public or civil society organizations that are interested,¹⁰¹ which provides nonstate actors with access to review procedures before an international body.¹⁰² Currently pending before the Aarhus Convention Compliance Committee is a complaint by Friends of the Earth Germany (*Bund für Umwelt—und Naturschutz Deutschland*), one of the most established environmental NGOs in Germany. The complaint attacks the translation of the Aarhus Convention into German law.¹⁰³ The proceedings were stayed until the *Trianel* ruling of the CJEU,¹⁰⁴ and were resumed after the CJEU’s judgment. Currently, the Committee is considering the most recent amendments to the UmwRG, and issued its

99. Aarhus Convention, *supra* note 45, at 463 (“The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.”).

100. See Report of the First Meeting of the Parties Decision I/7: Review of Compliance 4, U.N. ESCOR, Oct. 21–23, 2002, U.N. Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004) (emphasis added), available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>.

101. *The Aarhus Convention’s Compliance Committee Receives 50th Communication*, U.N. ECON. COMM’N FOR EUR., http://www.unece.org/press/pr2010/10env_p19e.htm (last visited Dec. 2, 2013) (explaining that the Compliance Committee reviews cases of alleged non-compliance by a Party to the Aarhus Convention).

102. See Veit Koester, *Review of Compliance Under the Aarhus Convention: A Rather Unique Compliance Mechanism*, 2 J. EUR. ENVTL. & PLAN. L. 31 (2005).

103. ClientEarth Complaint, *supra* note 5.

104. See Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, 2011 E.C.R. I-3676 ¶ 28 [hereinafter Opinion of A.G. Sharpston], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CC0115:EN:PDF>.

draft findings on November 11, 2013.¹⁰⁵ The Committee intends to find that German law does not comply with Article 9(3) of the Aarhus Conventions because the impairment of rights doctrine is still applied to environmental NGOs in all areas other than the UmwRG and the BNatSchG. The Committee broadly states, “access to [justice] should be the presumption, not the exception.”¹⁰⁶ The German government’s response relies on possible interpretive extension of the “impairment of rights doctrine” by German courts.¹⁰⁷ It is highly doubtful that the Committee would follow this argument. The Committee will very likely find against Germany.

Looking at the scenery even more closely, the picture is much more complex and nuanced than issues of “hierarchies” and “control” suggest. As mentioned above, Germany was an important and influential negotiator in drafting the Aarhus Convention and successfully introduced alternative (b), the “impairment of a right” approach, into the text.¹⁰⁸ Therefore, it is plausible that Germany invokes, at least to some extent, leeway in translating the Convention. Since the Aarhus Convention provides parties with a choice to facilitate implementation into respective domestic law, the idea of such leeway is certainly not out of the question. Rather, the legislative approach to providing such a choice (on Germany’s insistence) probably needs clarification. Presumably, only a Meeting of the Parties offers political opportunity to reach a mutual agreement, which is what the Compliance Committee in its draft findings suggests.¹⁰⁹

Interestingly, the German legal texts need to be translated into English, the working language of the Aarhus Compliance Committee.¹¹⁰ Communications should be submitted in one of the UN-ECE languages (English, Russian, and French); communications in Russian or French will be translated into English.¹¹¹ Supporting documentation is translated as well, unless it is very burdensome, in which case an English summary is prepared by a committee member familiar with the

105. The Draft Findings provide an interesting albeit rather simplified narrative of the “impairment of rights doctrine.” See ClientEarth Complaint, *supra* note 5, ¶ 27-35, 37.

106. See ClientEarth Complaint, *supra* note 5, Draft Findings (Nov. 11, 2013), ¶ 92, 97, 98.

107. See ClientEarth Complaint, *supra* note 5, Comments on the Draft Findings (by Germany, Nov. 12, 2013), at 7-11.

108. See *supra* Part II.A.1.

109. See ClientEarth Complaint, *supra* note 5, Draft Findings (Nov. 11, 2013), ¶ 101.

110. See U.N. ECON. COMM’N FOR EUR., GUIDANCE DOCUMENT ON THE AARHUS CONVENTION COMPLIANCE MECHANISM 13 (2010), available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf.

111. See *id.* at 35.

specific language.¹¹² Finally, measures or recommendations are translated by the Bureau of the Aarhus Convention into the three official UN-ECE languages.¹¹³ Translations from the original languages are meant to address the complex embeddedness of the relevant law, both within the broader legal framework and the politico-historical context of the law.¹¹⁴

2. *EU Law and Its Control: The Court of Justice of the European Union*

In many environmental agreements, the European Union has proven an effective, even decisive, actor in the implementation of international treaties into domestic law; the European Union can be described as a self-declared “assistant in executing” international environmental law.¹¹⁵ Another leading actor in this process is the CJEU. It has already delivered three important decisions regarding the Aarhus Convention and its implementation into the domestic laws of EU Member States, one concerning Sweden (*Djurgården*¹¹⁶), the second concerning the Czech Republic (*Slovak Bears*¹¹⁷), and the third concerning Germany (*Trianel*¹¹⁸). It is an interesting feature of EU law that judgments of the CJEU have implications for all Member States, even those who did not participate in a specific case. The findings of these three decisions clarify what the CJEU wants Member States to achieve when implementing the Aarhus Convention and corresponding EU law.

In *Djurgården*, the CJEU held, firstly, that prior participation of NGOs in the administrative process of decision making could not justify their exclusion from access to review procedures.¹¹⁹ Secondly, it held

112. *See id.* at 36.

113. *See id.* at 21.

114. The draft findings of the Compliance Committee reveal how complex the German legal situation appears to be from a bystander's perspective, *see* ClientEarth Complaint, *supra* note 5, Draft Findings (Nov. 11, 2013), ¶¶ 24-38.

115. *See* Koch & Mielke, *supra* note 61, at 407 (“selbstengagierte ‘Vollzugshelferin’ im Umweltvölkerrecht”).

116. Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*, 2009 E.C.R. I-9967 [hereinafter *Djurgården*].

117. Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, 2011 E.C.R. I-1255 [hereinafter *Slovak Bears*].

118. *See* Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, 2011 E.C.R. I-3701 [hereinafter *Trianel*].

119. *See* *Djurgården*, *supra* note 116, ¶ 39.

that environmental protections associations did not need to have at least two thousand members.

In *Slovak Bears*, a case concerning Article 9(3) of the Aarhus Convention, the CJEU attributed itself the power not only to interpret EU law but also the Aarhus Convention and to give a ruling on whether or not the Convention has direct effect within Member States' laws.¹²⁰ The Court held that it did have effect because Brown Bears were a species protected by the EU Habitats directive,¹²¹ even though Article 9(3) of the Aarhus Convention had not yet been explicitly implemented into EU law.¹²² While Article 9(3) of the Aarhus Convention "[does] not contain any clear and precise obligation capable of directly regulating the legal position of individuals,"¹²³ nevertheless, "it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection."¹²⁴ Relying on the principle of effectiveness (*effet utile*), the CJEU held that "if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law."¹²⁵ Concluding, the CJEU stated that "it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention."¹²⁶

Finally, in May 2011, the CJEU, in its *Trianel* decision, ruled on Germany's regulation of actions by environmental protection organizations. Coincidentally, the case involved a preliminarily referred case concerning the same environmental NGO, Friends of the Earth Germany, which brought the complaint to the Aarhus Compliance Committee. In its ruling, the CJEU simply and clearly stated:

If . . . those organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned *wide access to justice* and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the

120. See *Slovak Bears*, *supra* note 117, ¶ 43.

121. See *id.* ¶ 37.

122. See *id.* ¶ 47; *supra* Part II.B.1.

123. *Id.* ¶ 45.

124. *Id.* ¶ 46.

125. *Id.* ¶ 49.

126. *Id.* ¶ 50.

impairment of rules of EU environment law solely on the ground that those rules protect the public interest.¹²⁷

Consistently, the CJEU held that EU law

precludes legislation which does not permit non-governmental organisations promoting environmental protection . . . , to rely before the courts, in an action contesting a decision authorising projects “likely to have significant effects on the environment” for the purposes of [the EIA directive], on the infringement of a rule flowing from EU environment law and intended to protect the environment, *on the ground that that rule protects only the interests of the general public and not the interests of individuals*.¹²⁸

Again, it has to be noted that the situation is far more complex than the term “hierarchies” suggests. Germany is one of the most influential Member States of the European Union. When the European Union issues new legislation, German ministers have a say in the process.¹²⁹ A nuanced picture reveals that it is, however, far from clear what “the German position” is after all. While the German government negotiating the Aarhus Convention was opposed to or at least doubted representative environmental action, the subsequent Green minister of the environment promoted the project.¹³⁰ Intra-German conflicts about whether the German approach needs modification are as much at stake as hierarchical control via the CJEU. Past examples suggest that open conflicts resulting in enduring resistance by German courts or large parts of legal scholarship are undesirable for Germany and the European Union alike. Where the CJEU is concerned, critique has become much more rigorous and outspoken in recent years.¹³¹ Even a court as powerful as the CJEU will at some point have to seek support of its judicature. It seems conceivable that the question of

127. Trianel, *supra* note 118, ¶ 46 (emphasis added).

128. *Id.* ¶ 50 (emphasis added) (quoting Directive 85/337/EEC, *supra* note 75, art. 1(1)).

129. After all, the European Council consists of national government representatives, cf. Treaty on European Union, 2010 O.J. (C83), at 20, Art. 10: “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”

130. See Bunge, *supra* note 59; WIESINGER, *supra* note 59.

131. See generally DER EUGH IN DER KRITIK [THE ECJ IN THE FOCUS OF CRITICISM] (Ulrich Haltern & Andreas Bergmann eds., 2012) (providing an overview of recent criticism of the CJEU).

representative environmental action turns into the focal point of these broader confrontations.

In preparation of the CJEU *Trianel* decision, Advocate General Elinor Sharpston provided her opinion in English (the official language of the case had been German). In her opinion, AG Sharpston presented all relevant German norms translated into English.¹³² As shown above, mere literal translation is probably not enough to understand the historical context and the importance of these norms within the overall framework of administrative judicial review.¹³³ Although such translations are, without a doubt, necessary to enable international courts to deliver their rulings, it can also be observed in other instances that the translations unavoidably simplify, and sometimes even distort, the national legal situation.¹³⁴ This is not to argue that AG Sharpston's opinion was distorting but to highlight the difficulty of presenting a very complex web of relevant law in a few paragraphs and in a language other than the original. AG Sharpston even thanked the German government for background information.¹³⁵ She limited her presentation of the case to her personal understanding of the complex interplay of German norms in German law.¹³⁶ The complexities of German law forced AG Sharpston to elaborate on the idea of "a right which protects individuals" (yet another translation of "individual public right"), and she seemed astonished by some of its implications.¹³⁷ In the opinion, seven paragraphs are dedicated to explaining "the legal situation in Germany."¹³⁸ The example, thus, shows the extent of information that is needed for appropriate translations.

132. See Opinion of A.G. Sharpston, *supra* note 104.

133. See *supra* Part I.A..

134. See, e.g., *Von Hannover v. Germany (Caroline I)*, 2004 Eur. Ct. H.R. 294 (providing a very rough and sketchy translation and discussion of the delicate doctrine of the general personal right (*Allgemeines Persönlichkeitsrecht*) as developed in German constitutional court decisions over more than forty years).

135. Opinion of A.G. Sharpston, *supra* note 104, ¶ 29 ("The written observations of the German Government have been helpful in clarifying the problem set out in the order for reference.").

136. *Id.* ("The effect of this provision [VwGO § 42(2)] is, as I understand it" (emphasis added)).

137. *Id.* ¶ 30 ("The court may exercise its powers of review even where administrative bodies have a margin of discretion.") In light of the British *Wednesbury's* principle of reasonableness, such a close inspection of administrative decisions by the courts must seem very odd indeed to AG Sharpston. See *Assoc. Provincial Picture Houses*, *supra* note 37.

138. Opinion of A.G. Sharpston, *supra* note 104, at ¶¶ 29–35.

C. Second Attempt at Translation

Following the *Trianel* judgment of the CJEU, new legislation was drafted and issued in early April 2013. The new UmwRG omits the requirement of an “impairment of an organisation’s own rights” in the new section 2:

(1) A German or foreign association . . . may, *without having to assert that its own rights have been violated*, file appeals in accordance with the [VwGO] against a decision . . . if the association:

1. Asserts that a decision . . . violates statutory provisions that protect the environment and could be of importance for the decision;

2. Asserts that promotion of the objectives of environmental protection *in accordance with its field of activity as defined in its bylaws* is affected by the decision . . .; and

3. Was entitled to participate in a procedure [in specific environmental matters] and expressed itself in that matter according to the applicable statutory provisions or, contrary to the applicable statutory provisions, was not given an opportunity to express itself.¹³⁹

In section 2(5) of UmwRG, which regulates the merits of an action, “impairment of a right” has been removed as a prerequisite as well. For now, the major bone of contention has been removed from the UmwRG.

However, the new legislation has already been met with heavy criticism regarding various new aspects, suggesting a gloomy picture of

139. See Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG [Law on Supplementary Rules to Appeals in Environmental Matters According to the EC Directive 2003/35/EG], Umwelt-Rechtsbehelfsgesetz [UmwRG] [Environmental Appeals Act], Apr. 8, 2013, BGBl. I at 753 (Ger.); see also ClientEarth Complaint, *supra* note 5, at Annex III: Clean Version of the Consolidated Environmental Appeals Act, available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-31/correspondence/fr_GER_19Feb2013/Annex_III_UmwRG_Environmental_Appeals_Act_Jan2013_clean.pdf (providing an English translation of the Jan. 21, 2013 promulgation of the UmwRG).

yet another condemning CJEU decision to come.¹⁴⁰ Especially questionable is the regulation of procedural mistakes. Currently, procedural mistakes are only put under judicial scrutiny under a plausibility test, which is probably not strict enough.¹⁴¹ According to section 4a(1) of UmwRG, environmental NGOs have to substantiate their actions within six weeks—a period of time shorter than usual in administrative judicial proceedings.¹⁴² The deadline will probably prove to be very difficult to meet as environmental projects often involve complex technical questions.¹⁴³ Section 2(3) of UmwRG has also become a hotly debated regulation, as it precludes NGOs from judicial review if the NGO has not raised its concerns in the administrative processes prior to decision making.¹⁴⁴

On another front line, current judgments of German administrative courts strongly disagree about whether environmental NGOs can directly rely upon Article 9(3) of the Aarhus Convention.¹⁴⁵ As Article 9(3) has not yet been translated into EU law or German law, the translation answer is of the essence for the success or failure of actions brought by NGOs.

All these problems can essentially be traced back to the German concept of “individual public right”: resistance and nonacceptance hinder smooth implementation of both the Aarhus Convention and relevant EU law into German law. Of course, this is a very rough description. In fact, there are progressive statements, which argue for ways to fit protection of the environment into the individual rights approach.¹⁴⁶ The controversies also have a history dating back at least

140. See Schlacke, *supra* note 95.

141. *Id.* at 198-99.

142. Usually, an incomplete action has to be substantiated on the court's request according to section 82(2) of VwGO. The court sets “an adequate period of time.” By contrast, the period of six weeks provided for in § 4a(1) of UmwRG as per sentence 2 allows the court to preclude further substantiation of the action according to § 87b(3) of VwGO.

143. Schlacke, *supra* note 95, at 200.

144. *Id.* at 202.

145. The cosmos of court decisions has, for the most part, been neglected in this article; it would very well justify another article. Compare Verwaltungsgericht Augsburg [VG Augsburg] [Administrative Trial Court of Augsburg] Feb 2, 2013, docket number Au 2 S 13.143 (Ger.) (finding for direct applicability), available at <http://www.gesetze-bayern.de/jportal/portal/page/bsbayprod.psm1?doc.id=JURE130004078&st=ent&showdoccase=1¶mfromHL=true>, with Oberverwaltungsgericht Rheinland-Pfalz [OVG Rheinland-Pfalz] [Higher Administrative Court of Rheinland-Pfalz] Feb. 27, 2013, docket number 8 B 10254/13.OVG (Ger.) (finding against direct applicability), available at https://www.jurion.de/Urteile/OVG-Rheinland-Pfalz/2013-02-27/8-B-10254_13OVG.

146. See generally JULIAN KRÜPER, GEMEINWOHL IM PROZESS: ELEMENTE EINES FUNKTIONALEN SUBJEKTIVEN RECHTS AUF UMWELTVORSORGE [COMMON GOOD IN JUDICIAL REVIEW: ELEMENTS OF A FUNCTIONAL INDIVIDUAL RIGHT TO ENVIRONMENTAL

to the late 1980s when the influences of (then) European Community law started to grow and the traditional individual rights approach came under attack.¹⁴⁷ As always with historical narratives, they are not straightforward but characterized by "simultaneity of the non-simultaneous" (*Gleichzeitigkeit des Ungleichzeitigen*).¹⁴⁸ However, one can say that in Germany, reluctance and, at times, resistance vis-à-vis representative environmental action, have had the upper hand.

IV. CONCLUSION: CHARACTERISTIC FEATURES OF LEGAL TRANSLATIONS

In summarizing the findings of this article, characteristic features of legal translations appear.

A. Contextual Translation

First of all, it has to be noted that legal regulations do not happen in a vacuum. Every legal regulation, be it a single norm, an act of legislation, or a whole regulatory system, is situated in a specific context. German administrative judicial review has developed over time in a specific and rather peculiar way. This development finally led to the "individual public right," which can be described as one of the central features of German public law, especially after 1945, when it was strengthened by a constitutional provision guaranteeing judicial review against acts of public authority.¹⁴⁹ Because regulations do not exist

PRECAUTION] (2009) (drawing on expertise from various academic fields, e.g., sociology and political philosophy, and arguing for a "functional individual right to environmental precaution" (*funktional subjektives Recht auf Umweltvorsorge*," quotation translated by the author here)).

147. Compare BERNHARD W. WEGENER, RECHTE DES EINZELNEN: DIE INTERESSENTENKLAGE IM EUROPÄISCHEN UMWELTRECHT [RIGHTS OF THE INDIVIDUAL: ACTION OF INTERESTED PARTIES IN EUROPEAN ENVIRONMENTAL LAW] (Jürgen Schwarze ed., 1998) (Ger.) (arguing for an acceptance of the changes induced by EC law), with MATTHIAS RUFFERT, SUBJEKTIVE RECHTE IM UMWELTRECHT DER EUROPÄISCHEN GEMEINSCHAFT: UNTER BESONDERER BERÜCKSICHTIGUNG IHRER PROZESSUALEN DURCHSETZUNG [INDIVIDUAL RIGHTS IN EUROPEAN COMMUNITY ENVIRONMENTAL LAW: WITH PARTICULAR REGARD TO THEIR JUDICIAL ENFORCEMENT] (1996) (Ger.) (taking a decidedly national legal perspective), and JOHANNES MASING, DIE MOBILISIERUNG DES BÜRGER FÜR DIE DURCHSETZUNG DES RECHTS: EUROPÄISCHE IMPULSE FÜR EINE REVISION DER LEHRE VOM SUBJEKTIV-ÖFFENTLICHEN RECHT [THE MOBILIZATION OF THE CITIZEN FOR THE IMPLEMENTATION OF LAW: EUROPEAN IMPULSES FOR A REVISION OF THE THEORY OF THE INDIVIDUAL PUBLIC RIGHT] (1997) (Ger.) (taking an intermediate position).

148. See ERNST BLOCH, ERBSCHAFT DIESER ZEIT [INHERITANCE OF THIS TIME] (1935) (Ger.).

149. See WAHL, *supra* note 25, at 23; Christoph Schönberger, *Verwaltungsrecht als konkretisiertes Verfassungsrecht* [Administrative Law as Concretized Constitutional Law],

independently, translations between legal regulations have to acknowledge the specific contexts of regulations. To do so, these contexts have to be known.

B. Translation in Hierarchy and Under Control

The second aspect of translations between legal regulations concerns the complex, and at times, hierarchical relationships between different legal spheres. International law is binding to signatory parties, and yet, effective enforcement mechanisms are often a problem. EU law obliges EU Member States to change their respective domestic laws to eliminate conflicts; a powerful and efficient court, the Court of Justice of the European Union, exists to determine contested cases. Germany is both a party to the Aarhus Convention and a founding Member State of the European Union and, thus, is under dual obligation to implement both international and EU law. However, Germany adheres to its national legal peculiarities (and thus—as some argue—to its sovereignty), which inevitably leads to conflicts with the enforcement bodies of the other levels involved. Germany itself is a political player at both the international and the supranational level, sometimes not even talking with one voice but with the voices of different actors playing a double game.

C. Literal Translation as Basis for Legal Translations

A third and last feature of legal translations is the literal translation as an essential basis. The relations between different environmental legal regulations in the international realm, at the European Union level, and in German public law all need to be literally translated to become transferable and legally translatable. In the case of international and EU law, different language versions of the relevant legislation exist, all of which are authoritative and binding. Also, in proceedings of international courts and committees, German law requires translation (mostly into English) to enable the very proceedings.

D. The Persistence of National Peculiarities

This article has delineated multiple interwoven processes of translation between regulations in international, supranational, and

in DAS BONNER GRUNDGESETZ [THE BONN CONSTITUTION] 53, 71–76 (Michael Stolleis ed., 2006) (Ger.).

national law. The process of translating both the Aarhus Convention and EU law into German law has proven to be very complex. Both the Aarhus Convention and EU law leave it to the parties/Member States to implement either a "sufficient interest" approach or an "impairment of a right" approach. Thus, translators are provided with leeway on Germany's insistence. Whether this leeway is used appropriately is not always clear; it certainly leads to controversies both within and outside Germany. Nevertheless, the finding of this article is clear: Germany's "individual public right" as a national peculiarity persists and must not be neglected in legal translations. The example shows that such national peculiarities cannot easily be overcome or abandoned. Rather, they continue to play a significant role in transnational law.

